the father's right should be treated as lost or suspended and should be superseded or interfered with. Interference will be justified by actual cruelty of the father either to his wife or child, by his avowal and adoption of principles of an irreligious and immoral character, by marital misconduct or by lack of means. Other things being equal, it is preferable that a child of tender years should be with its mother."

As the wife in this case has made certain allegations against the husband, we are of the view that in the circumstances of this case the learned Chief Justice should have allowed counsel for the wife to cross-examine the husband.

The wife is not seeking a re-hearing of the matter but intends to apply for custody of the boy in some other court.

This appeal is allowed and the order of the learned Chief Justice is set aside. There will be no order as to costs.

Appeal allowed.

Solicitors: *Ironside & de Souza.*

RE VALIBHOY CHARITABLE TRUST; MOHAMED SHARIFF VALIBHOY v. BRITISH & MALAYAN TRUSTEES LIMITED & ORS.

[C.A. (Wee Chong Jin C.J., Chua and Kulasekaram JJ.) February 19, 1976]

[Singapore — Civil Appeal No. 10 of 1975]

Trust — Charitable trust — Clause providing for the setting up of school/schools for religious instruction or for the education of persons in the English language — Inability of trustees to implement provision — Whether trust ought to be applied cy-pres — Whether a general charitable intention for the advancement of education could be inferred.

By a Will dated April 1948, a testator gave his trustees upon trust certain sums of money for, *inter alia*, "... the purpose of buying land and buildings for and/or for building, maintaining, improving and establishing one or more schools at my trustees absolute discretion for religious instruction (known as Madrasahs) and one or more schools at my trustees discretion for the education of persons in the English language and general matters....". In 1971, the trustees, in accordance with the said trust provision, applied to the Ministry of Education, India, to set up school/schools but their application was not granted. In 1974, an Originating Summons was taken out by the trustees for the determination of whether certain provisions of the Will had failed in the events which had happened and on the true construction of the testator's Will, and if so, whether the doctrine of cy-pres ought to apply. The High Court ([1975] 1 M.L.J. 187) held that the trusts had not failed but should be carried into effect cy-pres by a scheme which conforms to the testator's directions as closely as possible.

The appellant appealed against the judgment and contended that as the main object of the testator's gift was the establishment of a particular type of school in a particular locality of his choice, a general charitable intention for the advancement of education could not be inferred. He further submitted that the learned Judge erred in law in directing that a scheme should be prepared and submitted for his approval as such direction is contrary to the general rule that the court will not direct a cy-pres scheme in respect of a charitable trust which is expressly intended to be performed in India which is outside its jurisdiction.

Held, dismissing the appeal: (1) if there are insuperable objections, either of fact or of law, to a literal execution of a charitable trust it at once becomes a question whether the desires or directions of the author of the trust, with which it is found impracticable to comply, are essential to his purpose. If a wider purpose forms his substantial object and the directions or desires which cannot be fulfilled are but a means chosen by him for the attainment of that object, the court will execute the trust by decreeing some other application of the trust property to the furtherance of the substantial purpose, some application which departs from the original plan in particulars held not essential and, otherwise, keeps as near thereto as may be;

(2) according to the true construction of the Will, it discloses a general intention of charity;

(3) the court may direct a scheme to be settled where trusts, which have been established within the jurisdiction for the endowment of a charitable object out of the jurisdiction become impracticable but the fund and the trustees are within the jurisdiction.

Cases referred to:-

(1) *Re Wilson, Twentyman* v. *Simpson* [1913] 1 Ch. 314 at pages 320 and 321.

(2) *Attorney-General (N.S.W.)* v. *Perpetual Trustees Co. (Ltd.)* (1940) 63 C.L.R. 209.

COURT OF APPEAL.

H. E. Cashin for the appellant.

H. M. Dyne for the trustees.

Warren Khoo (Dy. Senior State Counsel) for the Attorney-General.

Wee Chong Jin C.J. (delivering the judgment of the Court): By his Will made in April 1948 Haji Vali Mohamed bin Jooma otherwise known as Valibhoy Jumabhoy otherwise known as A.A. Valibhoy (hereinafter referred to as "the Testator") who died on April 8, 1950 devised and bequeathed to his Trustees all his property upon, *inter alia*, the following Trust (hereinafter referred to as "the Valibhoy Charitable Trust"):—

"4. My trustees shall set aside one third share of my net estate upon trust to pay thereout to the said ABDUL GANI BIN JINAH a sum of Rs. 25,000 and to AMED BIN JINAH a sum of Rs. 25,000 and upon Trust to HOLD the balance of such one third share of my net estate for charitable purposes (which said balance is hereinafter called "the Valibhoy Charitable Trust") and shall subject to the provisions of para 6 hereof hold the same upon the trusts following, namely:—

(i) To employ 30% of the capital of the Valibhoy Charitable Trust and any net income from time to time arising from such 30% for the purpose of buying land and buildings for and/or for building, maintaining, improving and establishing one or more schools at my trustees absolute discretion for religious instruction (known as Madrasahs) and one or more schools at my trustees absolute discretion for the education of persons in the English language and general matters. In connection with such schools I give to my trustees the following directions, namely:—

(a) Such schools shall, subject to the provisions hereinafter contained, be established in Jetpur and the state of Khatiawar, or at places in its neighbourhood, and

(b) Persons who profess the Mohamedan religion and are of the Gatchee class shall be given preference at all times in attending such schools as scholars.

(ii) To invest 50% of the capital of the Valibhoy Charitable Trust in the investments hereinafter authorised and to use the net income arising therefrom for the general upkeep and maintenance of all or any of such schools and for the provision of scholarships to such schools and to pay for the salaries accommodation and food of teachers, managers and other staff of the said schools and generally for the benefit of the said schools in such manner as my trustees shall in their absolute discretion think fit.

(iii) To invest 10% of the capital of the Valibhoy Charitable Trust in the investments hereinafter authorised and to use the net income arising therefrom in the repair and improvement of the said schools notwithstanding that there may be other moneys available for the said purpose.

(iv) To invest the remaining 10% of the capital of the Valibhoy Charitable Trust in the investments hereinafter authorised and to pay such part of the net income arising therefrom as my trustees shall in their absolute discretion think fit to or for the benefit of such of my sons and daughters as shall from time to time be indigent and to pay and use any balance of the net income arising from the said remaining 10% of the capital of the Valibhoy Charitable Trust to or for the benefit of such persons of the Gatchee class as shall profess the Mohamedan Sunni Hanafee religion and be indigent as my trustees shall in their absolute discretion think fit."

By Clause 5(iii) of the Will the Testator gave his Trustees in connection with the Valibhoy Charitable Trust power "to close and discontinue any school or schools so established as aforesaid if they shall so think fit and to establish another or others."

Clause 6 of the Will is in the following terms:—

"If any Government shall adopt acquire or undertake the management or support of any schools established as aforesaid then my trustees shall have complete discretion if they shall so think fit to use and apply the whole or such part or parts of the income arising from the Valibhoy Charitable Trust and referred to in clauses (ii) and (iii) of paragraph 4 hereof as they shall from time to time determine upon and for the purposes of the trusts declared in clause (iv) of paragraph 4 hereof instead of upon the trusts originally declared of and concerning the same."

For reasons, which it is unnecessary for us to set out, the actual appropriation of the one-third share of the net estate did not take place until 1964. Thereafter the Trustees appeared unable to implement the direction in clause 4(i) of the Will of establishing a school or schools for religious instruction or for the education of persons in the English language. In May 1971 one of the Trustees wrote to the Ministry of Education, Ahmedabad, India in the following terms:—

"i. We intend to establish a Muslim Religious School (Madrasha) in or around the town of Jepur, Rajkot District in which the 1st preference would be given to the children of Ghanchi Community who are believing the Sunni Hanafi Sect of the Islam and then to all Muslim Children only believing to the same school of Islam as the Ghanchi Community.

ii. If such Religious School is not allowed to be established due to laws of your state, then the Trustees of the Trust would like to establish an English Language School along with the Islamic Religious teaching subjects for the persons referred in foregoing paragraph."

The Director of Education replied in November 1971 that permission required to start new schools "as required by you cannot, it is regretted, be granted."

The Trustees took out an Originating Summons in 1974 for, *inter alia*, the determination of the following questions and for the following reliefs, viz:—

"(2) Whether on the true construction of the Testator's Will and in the events which have happened the Trust declaration concerning the Valibhoy Charitable Trust in Clause 4(i), (ii) and (iii) of the Testator's Will has failed and if so whether the capital and income set aside for the said trust ought to be applied cy-pres or whether such capital and income ought to be distributed as on an intestacy among those persons entitled thereto according to Muslim Law.

(3) If the answer to prayer 2 is that the trust fund should be applied cy-pres that a scheme may be directed for the Applicants as Trustees of the Valibhoy Charitable Trust to implement."

The matter came before Winslow J. who held that in the events that have happened it was impracticable to give effect to the expressed objects set out in clause 4(i), (ii) and (iii) of the Testator's Will. The learned judge also found that on a proper construction of clause 4 of the Will the Testator has evinced a general charitable intention in favour of the advancement of education (both religious as well as in English) and that the trusts under clause 4(i), (ii) and (iii) have not failed but should be carried into effect cy-pres by a scheme which conforms to the Testator's directions as closely as possible.

On behalf of the persons who would be entitled to benefit as beneficiaries upon an intestacy the present appellant, a son of the Testator, now appeals against the judgment of Winslow J. The Trustees also seek to vary the judgment.

The appellant contends that on the true construction of clause 4(i), (ii) and (iii) of the Testator's Will the trusts contained therein are for the specific purpose of establishing one or more schools in a particular province in a particular State in India or in its neighbourhood and that as the primary or main object of the Testator's gift was the establishment of a particular type of school in a particular locality of his choice, a general charitable intention for the advancement of education could not be inferred.

In our opinion the appellant's appeal should be dismissed. For the purposes of this appeal the English locus classicus on the point is the judgment of Parker J. in *Re Wilson, Twentyman* v. *Simpson*[1] at pages 320 and 321. It reads as follows: —

"First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out the precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good, and the Court, by virtue of its administrative jurisdiction, can direct a scheme as to how it is to be carried out. In fact the will will be read as though the particular direction had not been in the will at all, but there had been simply a general direction as to the application of the fund for the general charitable purpose in question.

Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift, — a gift for a particular purpose — and it being impossible to carry out that particular purpose, the whole gift is held to fail. In my opinion, the question whether a particular case falls within one of those classes of cases or within the other is simply a question of the construction of a particular instrument."

In Australia, the leading authority on the point is *Attorney-General (N.S.W.)* v. *Perpetual Trustee Co. (Ltd.)*[2] and in particular the judgment of Dixon J. and Evatt J. at page 225 where it reads as follows:—

"If there are insuperable objections, either of fact or of law, to a literal execution of a charitable trust it at once becomes a question whether the desires or directions of the author of the trust, with which it is found impracticable to comply, are essential to his purpose. If a wider purpose forms his substantial object and the directions or desires which cannot be fulfilled are but a means chosen by him for the attainment of that object, the court will execute the trust by decreeing some other application of the trust property to the furtherance

of the substantial purpose, some application which departs from the original plan in particulars held not essential and, otherwise, keeps as near thereto as may be. The question is often stated to be whether the trust instrument discloses a general intention of charity or a particular intention only. But, in its application to cases where some particular direction or directions have proved impracticable, the doctrine requires no more than a purpose wider than the execution of a specific plan involving the particular direction that has failed. In other words "general intention of the charity" means only an intention which, while not going beyond the bounds of the legal conception of charity, is more general than a bare intention that the impracticable direction be carried into execution as an indispensable part of the trust declared."

Later at page 227 Dixon J. and Evatt J. said:—

"In determining whether a wider charitable intention is the substantial purpose of the express directions by which the trust is constituted, the court is guided by the trust instrument and the conclusion is commonly said to depend on a question of construction. No doubt the terms of the document, together with any extrinsic circumstances admissible in aid of construction, form the materials for ascertaining whether the specific directions were animated by a wider charitable purpose which amounted to the true or substantial object of the trust. The process of extracting from such materials an intention implicit in the transaction which they evidence is properly called interpretation. But the construction of the language in which the trust is expressed seldom contributes much towards a solution. More is to be gained by an examination of the nature of the charitable trust itself and what is involved in the author's plan or project. In distinguishing between means and ends, between the dominant and the subsidiary, between the substance and the form, an understanding of the relative importance in fact of the component parts of the plan or purpose expressed in the trust is a first step towards forming an opinion of the respective values they possessed in the view of the testator or settlor. His forms of expression are by no means to be neglected. In the arrangement of his ideas and his use of terms the importance which he attached to the particular and to the general respectively may appear. The decided cases show that slight indications have at times been treated as enough to warrant a conclusion in favour of a wider charitable intention."

We agree with the conclusion arrived at by Winslow J. and we are of the opinion that according to the true construction of the Will, it discloses a general intention of charity or, to put it in another way, the paramount intention is to give one-third (less 50,000 Rupees) of the net residuary estate for a general charitable purpose.

Indeed by clause 4 of the Will the Testator set aside one-third of his net estate (less 50,000 Rupees) "for charitable purposes" upon trust as to 90% thereof for religious and English education and as to the remaining 10% for the relief of the poor. The paramount general charitable purpose or intention becomes the more apparent from the provisions of clause 5(iii) of the Will where the Trustees are given the power "to close and discontinue any school or schools so established as aforesaid ... and to establish another or others." Finally, in our opinion conclusively, there can be no doubt of the Testator's general intention of charity when one looks at clause 6 of the Will, *supra* where the Trustees are given complete discretion if they shall think fit to use and apply the whole or part or parts of the income arising from clause 4(ii) and (iii) for the purposes of clause 4(iv) i.e. for the relief of the poor, should any Government adopt, acquire or undertake the management or support of any schools established under clause 4(i).

The other contention of the appellant is that Winslow J. erred in law in directing that a scheme should be prepared and submitted for his approval as such direction is contrary to the general rule that the court will not direct a cy-pres scheme in respect of a charitable trust which is expressly intended to be performed in India which is outside its jurisdiction.

The undisputed facts before the court disclose that the net estate of the Testator which was appropriated to the Valibhoy Charitable Trust comprised not only property in Singapore, but also in Malaysia and India. It would appear from the Record of Appeal that this contention was not raised before Winslow J. who therefore did not consider the point. During the appeal counsel on behalf of the appellant relied on a passage in *Jarman* on Wills (8th Edition) at page 260 of Volume I which reads:—

"Foreign charities are an exception to the general rule, for as the court has no jurisdiction to administer a foreign charity, it cannot execute the trust cy-pres, but it may give liberty to a trustee to carry into effect a scheme for the administration of the charity to be settled by a foreign court. Consequently if the persons who are appointed by the testator to administer the charity abroad, disclaim or refuse to accept the trusts, the gift fails."

On this point *Halsbury's* Laws of England (4th Edition) Volume 5 paragraph 669 reads as follows:—

"669. *Property situated or payable abroad.* The court will not direct a scheme to be settled where the charity's property is out of the jurisdiction, or is a fund payable to trustees out of the jurisdiction. In such a case, the court may direct an inquiry whether the trust can be carried into effect according to the law of the particular country, and may pay the money to the persons selected by the testator as the instruments of his benevolence, if they are proper persons to act as trustees, but not otherwise, or may appoint new trustees for the purpose, or may retain the fund in court and direct payment of the dividends to the persons entrusted by the testator with the application of them, or may retain the fund in court to await the result of an application to the foreign court, or may give liberty to carry into effect a scheme to be settled by the foreign court.

The court may direct a scheme to be settled where trusts, which have been established within the jurisdiction for the endowment of a charitable object out of the jurisdiction, become impracticable but the fund and the trustees are within the jurisdiction."

In our opinion the applicable law is correctly set out in *Halsbury, supra* but unfortunately we have not had the benefit of the views of the Attorney-General's representative who appeared before us on his behalf or of Counsel for the Trustees. Having regard to this state of affairs, we are of the opinion that the order of Winslow J. directing that a scheme should be prepared and submitted to him for approval, such scheme to conform as closely as possible to the Testator's directions, ought not to be disturbed. We would only add that it would be desirable that the attention of the learned judge should be drawn to the passage at paragraph 669 of *Halsbury, supra* when the scheme is submitted for his approval.

Lastly, the Trustees contend that on failure of the trusts contained in clause 4(i), (ii) and (iii) all income arising thereunder should be applied for the purposes of the trust declared in clause 4(iv) of the Will. On this point neither this court nor the court below has had the benefit of the views of counsel for the appellant and of counsel for the Attorney-General. In these circumstances we are of the opinion that the order of Winslow J. ought not to be varied. In this connection we would also add that the attention of the learned judge should also be drawn to clause 6

of the Will when considering the approval of any scheme which is submitted to him and the desirability or otherwise of having further facts placed before him in relation to any proposed scheme. The costs of all parties will come out of the Valibhoy Charitable Trust funds.

Order accordingly.

Solicitors: *Murphy & Dunbar; Donaldson & Burkinshaw.*

M. VELAYUTHAM v. THE PORT OF SINGAPORE AUTHORITY

[O.C.J. (Chua J.) February 14, 1975]
[Singapore — Suit No. 609 of 1970]

Employment — Misconduct — Dismissal for misconduct — Employee previously charged for theft, and was acquitted by court — Whether "due inquiry" had been held — Whether chairman/general manager and the senior staff were empowered to dismiss — Employment Act (Cap. 122), s. 14(1) — Port of Singapore Authority Act (Cap. 173), s. 36(4) and Para. 14(2) of the First Schedule.

The plaintiff was employed as a senior leading checker at the P.S.A. Godowns. As a result of investigations made by the P.S.A. police arising from the report of loss of 83 cartons of brandy, the plaintiff was arrested and subsequently charged on April 17, 1968 in the District Court. On the same day, he was interdicted from service and put on half pay. On June 20, 1969 he was acquitted and discharged by the District Court without his defence being called. After the acquittal of the plaintiff the matter was considered by the P.S.A. and it was decided to dismiss the plaintiff for misconduct. The plaintiff was not asked to appear but on September 10, 1969 he received a letter from the Personnel Officer of the P.S.A. informing him that he was dismissed from service forthwith for misconduct. The plaintiff denied that he was guilty of any misconduct and said that he was not aware of what was the misconduct alleged against him. Counsel for the plaintiff contended that there had been no "due inquiry" as required by section 14(1) of the Employment Act (Cap. 122). He further referred to section 36(4) of the Port of Singapore Authority Act (Cap. 173) and submitted that the plaintiff was not dismissed by the Authority but by the Chairman/General Manager and the plaintiff's dismissal was therefore wrongful.

Held, dismissing the plaintiff's claim: (1) on the facts of this case there had been "due inquiry" within the meaning of section 14(1) of the Employment Act;

(2) the contention raised by counsel for the plaintiff that the plaintiff's dismissal was wrongful in that he was not dismissed by the Authority but by the Chairman/General Manager and the Senior Staff was not pleaded by the plaintiff and there was no strong justification for an amendment of the pleadings at the late stage;

(3) in any event there was provision in the Port of Singapore Authority Act for the Authority to delegate to any employee of the Authority their power to dismiss.

CIVIL SUIT.

J. B. Jeyaretnam for the plaintiff.

P. Selvadurai for the defendant.

Chua J.: The plaintiff was employed by the Port of Singapore Authority the defendant (hereinafter referred to as "the P.S.A.") as Senior Loading Checker at the P.S.A. Godowns and he was dismissed by the P.S.A. on September 10, 1969. He now claims against the P.S.A. for damages for wrongful dismissal and for arrears of salary.

The plaintiff's case is shortly this. He joined the P.S.A. in December 1947. It was then known as the Singapore Harbour Board. His first job was that of a tally clerk. In April 1968, he was holding the post of Senior Loading Checker and his salary was $470, basic pay, plus $94 cost of living allowance, making a total of $564 p.m. On April 17, 1968, he was charged in the District Court with the theft of 83 cartons of brandy from P.S.A. Godown 46. He claimed to be tried. On the same day he was interdicted from service and put on half pay. On June 20, 1969, he was acquitted and discharged by the District Court without his defence being called. He reported for work the next day but he was told to wait. His solicitors then wrote to the P.S.A. on June 30 requesting that he be re-instated. He was not re-instated and several reminders were sent to the P.S.A. by his solicitors. In the meantime he continued to draw half-month's salary. On September 10, 1969, he received a letter from the Personnel Officer of the P.S.A. informing him that he was dismissed from service forthwith for misconduct. He then commenced the present proceedings. He denies that he is guilty of any misconduct, in fact, he says, he does not know what was the misconduct alleged against him.

The P.S.A.'s case is that the plaintiff was rightly dismissed without notice for misconduct. They say that the plaintiff was involved in the theft of 83 cartons of brandy from P.S.A. Godown 46 on March 26, 1968. To substantiate their allegations they called a number of witnesses. The main witness was Giauw Yen Seng. The following story emerged from their evidence.

Giauw was working as a tally clerk on board a ship in 1947 or 1948 and in the course of his work at the P.S.A. Godowns he met the plaintiff. Giauw ceased to be a tally clerk in 1957.

Sometime in 1968 Giauw met the plaintiff by chance at a coffee stall. The plaintiff revealed to Giauw a plan to steal goods from the P.S.A. Godown by using a specially constructed wooden box which was to be brought into the Godown and there filled with goods and later taken out of the port. The plaintiff asked Giauw to have the wooden box constructed and to get a buyer for the goods. Giauw said that he had no money and the plaintiff asked him to borrow some.

Giauw took the plaintiff to see his friend Thon Nyuk Chiang. The plaintiff brought with him a model of the wooden box that was to be constructed. They then went to a carpenter in Pagoda Street to have a proper model made. A few days later the three of them went back to Pagoda Street and collected the model for which Thon paid the carpenter $5. The plaintiff then took Giauw and Thon to a place at Bukit Timah Road where the wooden box was to be constructed. There the plaintiff introduced them to his friend Ganapathy. Thon then agreed to lend the money for the construction of the wooden box.

A few days later the plaintiff, Giauw and Thon went to fetch the carpenter and they all went to a timber yard and purchased some timber for which Thon paid. The plaintiff and the carpenter then brought the timber to Ganapathy's place at Bukit